

IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH  
CENTRAL DIVISION

MARCOS ANTONIO REYEZ,  Plaintiff,  vs.  UNITED STATES OF AMERICA  Defendant.	ORDER    Case No. 2:07-CV-947 <i>Related to 2:04-CR-410</i>
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On December 6, 2007, Marcos Antonio Reyez filed a motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. On December 11, 2007, the government responded, asking this Court to dismiss Reyez's § 2255 motion on the ground that it is untimely. For the following reasons, the Court GRANTS the government's motion to dismiss.

Following a jury trial, Reyez was convicted of possession with intent to distribute methamphetamine in violation of 21 U.S.C. § 841(a)(1) and sentenced to 188 months imprisonment. (Civ. Dkt. 29, 36.) Reyez timely filed an appeal in the United States Court of Appeals for the Tenth Circuit. On June 8, 2006, the Tenth Circuit affirmed Reyez's conviction, and on June 30, 2006, the Tenth Circuit's mandate was issued. (Crim. Dkt. 60, 61.) Reyez claims that he was not notified of the Tenth Circuit mandate at the time it was originally issued

and that he remained unaware of the Tenth Circuit's decision until December 15, 2006. Reyez filed his § 2255 motion on December 6, 2007.

### **DISCUSSION**

Reyez's § 2255 motion is governed by the Antiterrorism and Effective Death Penalty Act (ADEPA), which establishes a one-year limitations period for federal prisoners seeking habeas relief. See 28 U.S.C. § 2255, ¶ 6; United States v. Burch, 202 F.3d 1274, 1275 (10<sup>th</sup> Cir. 2000) ("Congress has established a one-year period of limitations for habeas petitions."). The precise language of the statute provides that the one-year limitations period shall run from the latest of—

- (1) the date on which the judgment of conviction becomes final;
- (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed . . . ;
- (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
- (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2255, ¶ 6(1)-(4). The government claims that under § 2255(1) Reyez's motion is untimely and must be dismissed. Although the government incorrectly identifies the date on which the judgment became "final" for purposes of postconviction relief, the Court nonetheless agrees that Reyez's motion is untimely.<sup>1</sup>

The Supreme Court has explicitly provided that "when a defendant in a federal prosecution takes an unsuccessful direct appeal from a judgment of conviction, but does not next petition for a writ of certiorari . . . the judgment becomes 'final' for postconviction relief

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<sup>1</sup>The government asserts that Reyez's motion should be dismissed because he failed to file within one year after the date his judgment of conviction was affirmed by the Court of Appeals and the *mandate* was filed. (Govt.'s Br. at 2.) The government identifies July 5, 2006, the date on which district court filed the Court of Appeals' mandate, as the relevant date. As explained in detail in text, the one-year limitations period does not run from the date of the Tenth Circuit's mandate (June 30, 2006) nor does it run from the date the district court *filed* the Tenth Circuit's mandate (July 5, 2006).

purposes” when the time for filing a petition for certiorari expires. Clay v. United States, 537 U.S. 522, (2003); see also United States v. Burch, 202 F.3d 1274, 1275 (10<sup>th</sup> Cir. 2000) (“If a prisoner does not file a petition for writ of certiorari with the United States Supreme Court after [his] direct appeal, the one-year limitation period begins to run when the time for filing a certiorari petition expires.”) In this case, Reyes timely filed a direct appeal with the Tenth Circuit. On June 8, 2006, the Tenth Circuit affirmed Reyes’s conviction, and on June 30, 2006, that court’s mandate was issued. See Fed. Rules App. Proc. 40(a)(1) and 41(b) (providing that when no petition for rehearing is filed, a court of appeals’ mandate issues 21 days after entry of judgment). Reyes did not file a petition for writ of certiorari, and the time in which he could have petitioned for certiorari expired on September 8, 2006. See U.S. Supreme Court Rule 13(1) (providing that a writ of certiorari to review a judgment entered by a United States court of appeals is timely filed when it is filed within 90 days after entry of the judgment); see also United States v. Clay, 537 U.S. 522, 525 (2003) (providing that time to petition for certiorari expires 90 days after entry of Court of Appeals’ judgment and 69 days after the issuance of the appellate court’s mandate). Therefore, under § 2255, ¶ 6(1), the one-year limitations period began to run at that time. Because Reyes did not file his § 2255 motion until December 6, 2007, approximately one year and three months later, the Court finds his motion is untimely.

Reyes acknowledges that he filed his § 2255 motion after the one-year limitations period set forth in subsection (1) had expired. He claims, however, borrowing language from subsection (4), that the limitations period should be extended because “the deficiencies in appellate counsel’s performance did not become known until December 15, 2006.” (Civ Dkt. 1, 2.) Although subsection (4) can, under certain circumstances, extend the limitations period

beyond one year from the date on which the judgment of conviction became final, it does not apply in this case.<sup>2</sup>

Under subsection (4), the one-year limitations period does not begin to run until “the date on which the facts supporting the claim could have been discovered through the exercise of due dilligence.” In this case, the claim identified in Reyez’s § 2255 motion is based on ineffective assistance of *trial counsel*, and *trial counsel’s* failure to file a motion for new trial. Because Reyez has been aware of the facts supporting his ineffective assistance of trial counsel claim since the conclusion of trial, application of subsection (4) would actually present an earlier limitations date than the date Reyez’s conviction became final, and the alleged “deficiencies in appellate counsel’s performance” are irrelevant. Moreover, by Reyez’s own admission he became aware of the Tenth Circuit’s decision no later than December 15, 2006, and thereafter had nine months in which he could have timely filed his § 2255 motion.

For the foregoing reasons, Reyez’s § 2255 motion is dismissed.

It is so ordered.

Dated this 19<sup>th</sup> day of February, 2008.

A handwritten signature in black ink that reads "Dee Benson". The signature is fluid and cursive, with the first name "Dee" and last name "Benson" clearly distinguishable.

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Dee Benson  
United States District Judge

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<sup>2</sup>It is undisputed that subsections (2) and (3) do not apply. The record contains no indication of either governmental action preventing Reyez from making a motion, or a newly recognized right made retroactively applicable. See 28 U.S.C. § 2255, ¶ 6 (2), (3). Moreover, the case does not present extraordinary circumstances such that Reyez would receive the benefit of equitable tolling. See Miller v. Marr, 141 F.3d 976, 978 (10<sup>th</sup> Cir. 1998) (concerning § 2254); see also United States v. Willis, 202 F.3d 1279, 1281 n.3 (10<sup>th</sup> Cir. 2000) (concerning § 2255).